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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

vs.

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

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The National Security Industrial Association respectfully submits this brief Amicus Curiae. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

INTEREST OF AMICUS

The National Security Industrial Association ("NSIA") is a non-profit association of approximately two hundred and fifty American industrial and research companies of all sizes which

provide products and services to the United States Government. The association's essential purpose is to foster an effective working relationship between government and industry in the interest of national security. It regularly provides advice and technical assistance to the government.

The present case is of substantial concern to the members of the association. Virtually all of them regularly submit proprietary information to federal agencies which may be subject to disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. Of particular concern to NSIA is disclosure of information submitted in connection with the government's procurement of goods and services. Each member regularly submits, for example, bid proposals which contain, among other things, advanced technology descriptions and detailed cost and pricing data. The protections given such proprietary data by Exemption 4 of the FOIA and 18 U.S.C. §1905 have been greatly reduced if not eliminated by the Third Circuit's opinion. Contrary to that opinion these protections are essential to protect proprietary data from disclosure to foreign and domestic competition.

The association is also concerned that a judicial determination which precludes adequate protection of confidential data will impair the government's ability to collect sufficient information in the future. Much of that information is voluntarily submitted, in confidence, to aid the government in meeting its procurement goals. A free and regular exchange of information is not only essential to fulfilling procurement goals but is also only possible in a confidential environment.

THE TYPE OF INFORMATION SUBMITTED TO FEDERAL AGENCIES IN THE PROCUREMENT PROCESS

The decision of the Third Circuit Court of Appeals in *Chrysler v. Schlesinger* threatens the defense industry with unprecedented disclosure of trade secrets. The seriousness of the problem is demonstrated by a brief review of the type of information submitted to the government by the industry.

When the government seeks to procure a complex good or service, it issues a request for a proposal. The government's request can be and often is nothing more than a performance specification of a goal it wishes achieved, *e.g.*, production of a missile that can reach a targeted site at a certain speed and with a specified accuracy. The usual proposal submitted in response is a lengthy and detailed description of how the defense contractor will accomplish the envisioned task. A contractor's proposal would, for example, normally contain, *inter alia*: (1) detailed operational designs, (2) a description of performance characteristics, (3) the names, functions and qualifications of management and personnel who will be performing the contract, (4) a thorough description of facilities and production capabilities, (5) production specifications and techniques (including historical and projected standard hours for various production operations), (6) results of development tests, (7) quality control techniques, and (8) overall and itemized costs. A competitor describes in detail in its proposal its unique capabilities in an attempt to convince the government to select it as the contractor.

In *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1975) a proposal (for a computer based regulatory information system) was summarized as follows:

> [The proposal] represents the ultimate summation of PRC's methodology, in terms of corporate strategy, man-

agement techniques, and state-of-the-art technology, for entry into a new business area. It discloses in detail the company's techniques for informational system analysis, design, and verification, system implementation, facility planning, operation and maintenance, and project management procedures. * * * It describes in great detail the company's unique corporate approach to planning and executing large-scale projects, including specific blueprints for the company's every step in planning, installing, and operating a sophisticated computer facility. It offers innovative options, not solicited by the Request for Proposals, for dynamic system modeling and alternatives to the plan embodied in the Request for Proposals. It provides costing information in complete detail, the disclosure of which would enable any competitor to predict the company's pricing schedules with alarming accuracy in any bidding procedures. In short, it sets forth all of the company's trade and marketing secrets, developed over more than 20 years of experience at great expense, the disclosure of which to competitors would provide those competitors with a direct source of materials for their own proposals now being developed for the installation of similar computer systems in other agencies. 555 F.2d at 972.

A substantial amount of documentary information about a defense contractor is also generated subsequent to a contract award and during the production phase. Some of that information includes regular cost reports, contract funds status reports, regular production progress reports, Defense Contract Audit Agency audits,[1] and quality deficiency reports. This kind of information reveals (a) *manpower data* (learning curves, productivity, forecasts and projections of future workloads, and man hours incurred to accomplish a specified task); (b) *material data* (shortages, competitive vendor quotes, procurement costs, and lead times); (c) *cost data* (incurred costs, estimated costs at completion, productivity trends, program performance, direct costs, material and overhead costs and estimating and pricing practices together with future projections of everything from likely new business to later union settlements); and (d) *performance data* (delivery dates, production sequencing, master construction schedules, and efficiency).

[1] In addition, government contractors are subject to government auditors inspecting, auditing, and copying documents relating to performance under the contract. See, *Kleinschmidt Division, SCM*, Armed Services Board of Contract Appeals No. 21022 (April 24, 1978).

It would appear on its face that this information is trade secret and commercial information which could be of substantial use to competitors and should not be disclosed by federal agencies pursuant to Exemption 4 of the FOIA and 18 U.S.C. § 1905. The painful experience of many of the members of NSIA, however, has been that the agencies have disclosed such information to domestic and foreign competitors, at times even without notifying the submitter.

The experience of two of NSIA's members, while unreported but carefully verified by counsel, illustrates for the Court the serious problem of loss of American technology to foreign competition. General Dynamics was awarded a contract by the United States government to develop and produce large ocean data buoys and in connection therewith had submitted a production data package to the United States Coast Guard. In 1974, General Dynamics submitted a proposal to the Canadian government to manufacture ocean buoys and shore stations. Unbeknownst to General Dynamics, a Canadian company obtained, through the Freedom of Information Act, the production data package from the Coast Guard and utilized this information to successfully underbid General Dynamics on the sale of the ocean buoys to the Canadian government. In 1973, Dow Chemical Company was involved in negotiations with a Japanese firm for the sale of a Dow chemical process to the foreign firm.

During the negotiations, Dow and two other American manufacturers were required by a federal agency to submit, for environmental studies, certain information about the process to the agency. A short while later, the Japanese firm indicated to Dow that they were no longer interested in the process. Upon investigating the matter with the agency, Dow learned that the foreign firm had obtained from the agency, under the Freedom of Information Act, copies of the information submitted by Dow and the two American firms. Dow thereby lost the opportunity to sell its technical know-how.

There are numerous reported instances in which the contractor has been confronted with an agency's willingness to disclose bid proposal information to domestic competition. In *USS-OCF-W&M v. Eckerd*, No. 76-1933 (D.D.C., December 9, 1976), the requester sought and the agency was willing to disclose data and engineering drawings for building components contained in a successful government contract proposal. In *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976) the agency had indicated that it would disclose costs, prices, profits and cash flow provisions in a sub-contract under a government contract for nuclear powered propulsion systems. In *General Dynamics v. Brown*, No. 77-0905C(2) (E.D. Mo. Aug. 18, 1977) *(cause dismissed October 19, 1977 when FOIA request withdrawn)*, an agency determined that technical and cost data in a successful bid proposal on the first of our different versions of the cruise missile was disclosable. In *Burroughs Corporation v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975), the information deemed disclosable by the agency was prices and discounts for components for a computer data processing system contained in an unsuccessful proposal for a government contract. Similarly in other cases, agencies have indicated that they would release technical and cost data in other computer system proposals. See *Planning Research Corp. v. FPC, supra*, 555 F. 2d at 971; *Honeywell Information Systems, Inc. v. NASA*, No. 76-353 (D.D.C. July

28, 1976), appeal dismissed No. 76-1977 (D.C. Cir. May 6, 1977); *Leeds and Northrup Company v. Energy Research and Development Administration*, No. 77-1047 (D.D.C. June 16, 1977) *(cause dismissed on July 11, 1977 under stipulation not to disclose)*.

A recent direct FOIA opinion further demonstrates the aggressiveness of competitors and the valid basis for concern that loss of competitive information in proposals does occur, even with judicial approval. In *Shermer Industries Inc. v. Secretary of United States Air Force*, No. 77-1495-F (N.D. Tex. May 2, 1978) the requester sought the cost proposals of three competitors for overhauling airborne generators, even though the contract was partially in the pre-award stage. The Court ordered release of the information upon the questionable finding that the information was not within 18 U.S.C. §1905 and was not protected by Exemption 4 of FOIA because that section must be read "narrowly".

THE DECISION TO DISCLOSE CONFIDENTIAL BUSINESS INFORMATION PROTECTED BY EXEMPTION 4 OF THE FOIA AND 18 U.S.C. §1905 SHOULD NOT BE LEFT TO THE DISCRETION OF AN AGENCY

If Exemption 4 of the FOIA is permissive and if federal agencies have the discretionary power to release exempt documents, as the Third Circuit holds, the protections afforded confidential commercial information by Congress have been all but eliminated. If left to stand the Third Circuit's decision would reduce Exemption 4 and 18 U.S.C. §1905 to ineffectual admonitions. The decision is contrary to public policy and legislative history and fails to recognize the critical distinction between government and private information.

Businesses have always maintained their records in confidence. The reason for secrecy is founded in the concern that such in-

formation might be helpful to a competitor and in the desire to conduct business affairs in private. This Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), affirmed the importance of protection of confidential business data such as trade secrets:

> The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. 'The necessity of good faith and honest fair dealing is the very life and spirit of the commercial world.' . . . In *A. O. Smith Corp. v. Petroleum Iron Works Co.*, 73 F. 2d at 539 [6th Cir. 1934], the court emphasized 'that even though a discovery may not be patentable, that that does not destroy the value of the discovery to one who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer.' 416 U.S. at 481-2.

The above expressed public policy, which prevents unfair competitive use of confidential commercial information, is embodied in various provisions of federal law. Exemption 4 of the FOIA, the federal criminal code prohibition against disclosure of business secrets (18 U.S.C. §1905), and the federal procurement regulations proscribe disclosure of trade secrets and proprietary business data. "These provisions recognize and provide for the non-disclosure of confidential business information compiled through an owner's efforts, skills, and resources, and thus, there is [a] public interest in favor of judicial protection of such data". *USS-OCF-W&M v. Eckerd, supra,* No. 76-1933, slip. op. at 5.

The legislative history of Exemption 4 confirms these public interest concerns. Both the House and Senate Reports on the FOIA bills provide that the exemption is intended to protect information which *customarily* would not be released to the public by the person from whom it was obtained. It seems clear

that in enacting Exemption 4 Congress specifically sought to protect business information which industry *customarily* held in confidence and expressly exempted such information from mandatory disclosure.

The Senate Report, citing examples of the types of information which "customarily would not be made public", provides that this category would include business sales statistics, inventories, customer lists, manufacturing processes, and "any commercial, technical, and financial data" submitted to a lending agency in connection with a loan.[2] The House Report also specifies that the exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in labor-management mediations.[3] The congressional reports provide that these broad categories of materials are to be exempt from disclosure *per se*, without any inquiry into whether their release in whole or in part would result in competitive injury. The legislative history of FOIA, then, suggests the adoption of the public policy of protecting business information submitted by private parties. As stated in hearings on the FOIA bill: "We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.[4]

FOIA's legislative history also seems to make clear that the only intent and purpose of the Act was to make available to the public information concerning records and actions of the various underlying governmental agencies. It was *not* intended to make public reports, plans and data confidentially submitted

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[2] S. Rep. No. 813, 89th Cong., 1st. Sess. 9 (1965).

[3] H.R. Rep. No. 1497, 89th Cong., 1st. Sess. (1966).

[4] Hearings of S.1666 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st. Sess. 174 (1964) (Treasury Department Witness).

to the government by underlying private parties. As stated by one commentator,[5] and as cited with approval in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F2d 1190, 1210 (4th. Cir. 1976):

> The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.

It would seem fundamental that private information and private documents do not lose their private character merely because such documents have been submitted to a governmental agency either pursuant to a mandatory filing requirement or voluntarily in an effort to comply with a regulatory program, to cooperate with a government fact finding agency, or to aid the government in the process of obtaining its procurement goals. A private document should remain private even though information taken therefrom may be used confidentially by government for its own purposes.

The Third Circuit's opinion has failed to give recognition or meaning to the intent and purposes of FOIA Exemption 4 and 18 U.S.C. § 1905. It was this seemingly clear intent to protect business data that led the Fourth Circuit, in *Westinghouse Electric Corporation v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric Corp.*, 97 S. Ct. 2199 (1977), to find that Exemption 4 was mandatory, and the D. C. Circuit, in *Charles River Park "A", Inc. v.*

[5] Note, A Review of the Fourth Exemption of the Freedom of Information Act, 9 Akron L. Rev. 673, 694 (1976) (footnote omitted.)

HUD, 519 F.2d 935 (D.C.Cir. 1975), to find that agency disclosure in violation of § 1905 would, in and of itself, be an arbitrary and capricious act. In finding Exemption 4 permissive and in finding 18 U.S.C. § 1905 inapplicable, and in further finding that a disclosure decision as to business data should be left to the discretion of an agency, and in denying effective judicial review of that decision, the Third Circuit has all but eliminated the ability of the owner of business data to protect it from disclosure.

DE NOVO REVIEW OF A CLAIM OF CONFIDENTIALITY IS NECESSARY AND WAS INTENDED BY CONGRESS

Prior to *Chrysler*, the Fourth and the District of Columbia Circuits had ruled that a judicial determination as to whether business records were within FOIA Exemption 4 was to be made *de novo*.[6] The determination was to be made *de novo* regardless of whether the issue was raised by a requester in a FOIA action to compel disclosure of the records, or by a company seeking to prevent disclosure in a reverse FOIA action.[7]

In the instant case the District Court held an evidentiary hearing in which Chrysler was permitted to prove the confidential nature of the data in issue. On the basis of Chrysler's proof, the District Court issued detailed findings of fact and concluded that Chrysler could be harmed competitively by disclosure of portions of the data. The Third Circuit reversed. It held that Chrysler was not entitled to *de novo* review, that the District Court was confined, under an APA standard, to review of the

[6] See *Westinghouse Elec. Corp. v. Schlesinger, supra*, 542 F.2d at 1214-15; *Sears, Roebuck and Co. v. GSA*, 553 F2d 1378, 1381 (D.C.Cir. 1977); *Charles River Park "A", Inc. v. HUD, supra*, 519 F.2d. at 940 n. 4. FOIA affords a requester seeking to compel disclosure *de novo* review. 5 U.S.C. §552(a)(4)(B).

[7] *Id.*

administrative record, and that the agency action could only be set aside upon a showing that that action was arbitrary and capricious.

This holding would perhaps not seem so startling if the submitter had the opportunity to present its case to the agency and thereby develop a record sufficient for judicial review. The fact is, however, that the submitter of information is given, in most instances, no opportunity to make even a cursory showing at the agency level. The FOIA and the agencies' procedures implementing the statutory mandate of the FOIA preclude that opportunity.

First neither the FOIA nor most agency regulations require that notice be provided to submitters. Second even when notice is provided gratuitously, disclosure decisions must under the FOIA be made in only ten days. *See* 5 U.S.C. § 552 (a)(6)(A)(i). Finally neither FOIA nor agency regulations require agencies to extend the ten day limit, to provide the submitter with a hearing, or to make findings in support of a decision to disclose. Not only do these facts do violence to fundamental concepts of due process but they also render impossible any meaningful judicial review of the often skimpy or non-existent "administrative record".

The cornerstone, then, of the Third Circuit's decision, adequate agency consideration, is a fiction, which rests on the Third Circuit's misconstruing the FOIA and Congressional intent. Congress did not intend to preclude *de novo* review of a submitter's claim that trade secret and confidential information is exempt from disclosure under the FOIA. If Congress had had that intent it would not have compelled agency disclosure decisions within ten days thereby making adequate agency review and development of an agency record next to impossible.

It has been the experience of the members of NSIA that the only opportunity given them to make their record is in the

form of a letter to the agency. That letter is hurriedly submitted within ten days, is necessarily general and conclusory, and is usually based on inadequate study of the often voluminous documents requested. The practical consequences of the Third Circuit's holding is that this brief letter is the only opportunity a submitter will ever be given, either in an agency or in court, to substantiate its claim of confidentiality. Congress could not have intended such a result.

To the members of NSIA this result is nothing short of absurd. As discussed above, the defense industry submits, *inter alia*, multi-volume bid proposals to federal agencies. The proposals, as well as numerous other documents submitted in the procurement process, contain confidential information about virtually every aspect of a contractor's business. Agency disclosure decisions relating to this information should involve a careful evaluation of complex economic and technical considerations as well as an understanding of the competitive environment in which the defense industry operates. They do not. The agencies often do not have the personnel with the specific knowledge necessary to evaluate the detrimental competitive impact disclosure could have upon a contractor, or the interest to adequately pursue or protect the rights of that contractor. Under the ten day limitation the agencies also do not have the time to receive, much less review and comprehend, evidence submitted in support of a contractor's claim of confidentiality.

The Third Circuit's opinion rests on a fiction that confidential commercial information is sufficiently protected by careful agency review. It is not. The FOIA has precluded it. A contractor threatened with disclosure of confidential business data should be afforded the same *de novo* judicial review that FOIA gives to a requester seeking to compel disclosure. In finding that a submitter was not entitled to *de novo* review, the Third Circuit has misconstrued the intent of Congress and has denied

a submitter of confidential information a fundamental due process right to be given an opportunity to protect its trade secret information.

Respectfully submitted,

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